IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

MONDAY THE FOURTEENTH DAY OF MARCH
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE SRI JUSTICE M.H.S. ANSARI

AND
THE HON'BLE SRI JUSTICE T.Ch.SURYA RAO

WRIT PETITION No.2533 of 2005

Between:

1. M/s. Mars Therapeutics & Chemicals Ltd.,

8-290/1, Goutham Nagar, Ferozguda, Secunderabad-500 011,

rep. by its Managing Director, Sri P.Appa Rao.
2.Sri P. Appa Rao, S/o. Venkateswarlu,
Plot No.46/A, Flat No.201, Balaji Residency, Vengalrao Nagar, Hyderabad.

..... PETITIONERS

AND

1.The Customs & Central Excise Settlement Commission,

Additional Bench, Narmada Block, Custom House, 33, Rajaji Salai, Chennai-600 001.
2.The Commissioner of Central Excise, Hyderabad-IV Commissionerate, Possenet Bhavan, Ramkoti,Hyderabad.

.....RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court may be pleased to issue a writ, order or direction more particularly one in the nature of writ of Certiorari calling for the records pertaining to the impugned order No.39/2004-CE, dt.22-12-2004 passed by the 1st respondent and to set aside the same as illegal, arbitrary, violative of the Principles of natural Justice and contrary to the provisions of Section

32 E &F of the Central Excise Act 1944 and to further direct the 1st respondent to proceed with the application of the petitioner dt. 05/04/2004 for settlement of the case and to dispose of the same on merits in accordance with provisions Chapter V of Central Excise Act, 1944.

Counsel for the Petitioner: M/s.MOHAN VINOD & ASSOCIATES

Counsel for the Respondent No.: Mr.A.RAJASEKHAR REDDY,

STANDING COUNEL FOR

CENTRAL GOVT.

The Court at admission stage made the following :

ORDER: (per Sri Justice M.H.S.Ansari)

The instant writ petition is directed against the Order No.39/2004-CE, dated 22-12-2004 passed by the Customs & Central Excise Settlement Commission – first respondent herein. By the said order, the Settlement Commission rejected the application filed under Section 32F(1) of the Central Excise Act, 1944 on the ground that the petitioner had not made a full and true disclosure of duty. It was directed by the impugned order that the Revenue shall take up adjudication of the case as if no application is filed for settlement.

Brief facts of the case leading to the filing of the instant writ petition are as under:

The petitioner is a company incorporated under the Indian Companies Act, 1956 and it is the case of the petitioner that it established a small scale unit for the manufacture of P or P Medicaments. It started commercial production since January 1998. The officers of Central Excise, Anti Evasion Wing searched the factory-cum-office premises of the petitioner and taken over certain records. A search was also conducted at the depot premises of M/s.Arsa Pharmaceuticals (P) Ltd., which, according to the petitioner, is buyer of the petitioner's products, whereas, according to the Revenue, it is the petitioner's sole distributor. Certain records were seized from the premises of M/s.Arsa Pharmaceuticals (P) Ltd. The petitioner was served with a show cause notice dated 9-3-2004 alleging that the petitioner indulged in clearance of P or P Medicaments without cover of Central Excise duty paid invoice and without accounting for in the stock registers. A demand was raised of

Rs.13,64,684/- and a further demand in the sum of Rs.13,50,000/- was also raised on the ground that the petitioner is not entitled to the benefit of Notification No.8 of 2000 applicable to SSI units. The petitioner was asked to show cause why the sums demanded should not be paid by it together with penalty. On receipt of the said show cause notice, the petitioner filed an application dated 5-4-2004 under Section 32E of the Central Excise Act before the Settlement Commission. This, according to the petitioner, was to put an end to the litigation and to buy peace with the Department.

The case of the petitioner is resisted by the respondents on the ground that before the Settlement Commission, the petitioner was given sufficient opportunity to put-forth his case. The rejection of the application was due to wrong disclosure of duty liability. The petitioner was in fact cautioned regarding the importance of truthful disclosure by the Commission vide its interim dated 1-9-2004. Despite the same, the petitioner stuck to his incorrect and untruthful disclosure. The order impugned in the instant writ petition warrants no interference in exercise of the power of judicial review.

Ld. counsel for the petitioner contended that the application filed by the petitioner before the ld. Settlement Commission was required to be admitted and could not have been rejected for the reasons stated in the impugned order. The petitioner fulfilled all the conditions prescribed in Section 32E of the Act. At the stage of admission, the procedure contemplated by the Central Excise Act does not envisage any enquiry to be made or to record a finding that the applicant has not made truthful disclosure of his duty liability. The application has been rejected on untenable grounds, it was urged. The impugned order also suffers from violation of principles of natural justice, in that, the petitioner was not afforded opportunity to verify or to go through the reports submitted by second respondent on 3-6-2004 and 20-9-2004 nor copies thereof were furnished to the petitioner. It was further contended that leading of evidence is not contemplated at the stage of admission of the application. The application could not, therefore, have been dismissed on that ground or on the ground that the valuation claims made by the petitioner were unsubstantiated or on the ground that the petitioner has not admitted the entire duty liability. Ld. Settlement Commission, it was contended, has overlooked the fact that the allegations in the show cause notice (for short ‘SCN’) are yet to be substantiated by the Revenue and even before that stage the application has been rejected.

Sri A.Rajasekhara Reddy, learned Senior Standing Counsel for Central Government sought to sustain the impugned order for the reasons contained therein. It was further submitted that the orders being conclusive, the validity thereof has to be examined in the light of the limited scope of judicial review. It was strenuously urged that the petitioner failed to make true and full disclosure of their duty liability, which is a condition precedent for entertaining the application and, therefore, the impugned order does not warrant interference.

Before we deal with the rival contentions, a brief look at the relevant provisions of the Central Excise Act would be appropriate.

Chapter V containing Sections 31 and 32 has been inserted with effect from 1-8-1998 in the Central Excise Act, 1944 by the Finance Act 2 of 1998.

Under definition Section 31, any proceeding pending under the provisions of the Act has been defined as falling within the meaning of the word 'case' used in Chapter V. Under Section 32, Customs and Central Excise Settlement Commission is constituted for settlement of cases under Chapter V and Chapter XIVA of the Act, which shall consist of Chairman and as many Vice-Chairmen and other members as the Central Government thinks fit. The decision is to be by majority (Section 32D). Under Section 32E, an assessee can apply to the Settlement Commission to have his case settled, and once he makes an application, he shall not be allowed to withdraw the same. For the sake of convenience, relevant portion of Section 32E is extracted hereunder:

"SECTION 32E. Application for settlement of cases. – (1) An assessee may, at any stage of a case relating to him make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer having jurisdiction, the manner in which such liability has been derived, the additional amount of excise duty accepted to be payable by him and such other particulars as may be prescribed including the particulars of such excisable goods in respect of which he admits short levy on account of misclassification or otherwise of such excisable goods, to be Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless, -

a. the applicant has filed returns showing production, clearance and central excise duty paid in the prescribed manner;

b. a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant; and

c. the additional amount of duty accepted by the applicant in his application

exceeds two lakh rupees:"

(emphasis supplied)

Power is conferred under Section 32F on the Settlement Commission to call for a report from the Commissioner of Central Excise and to pass orders allowing the application filed by the assessee to be proceeded with or to reject the application. Where an application is allowed to be proceeded with, the Settlement Commission may call for the relevant record from the Commissioner and if it forms the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner (Investigation) to make or cause to make further enquiry or investigation and furnish a report on the matters covered by the application and any other matters relating to the case. After examination of the records and report of the Commissioner under sub-section (1) and the report, if any, of the Commissioner (Investigation) of the Settlement Commission under sub-section (6) and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may pass such order as it thinks fit on the matters covered by the application and any other matters relating to the case not covered by the application but referred to in the report of the Commissioner under sub-section (1) or sub-section (6). Every order passed under sub-section (1) shall provide for the terms of the settlement including any demand by way of duty, penalty or interest, the manner in which any sums due under the settlement shall be paid and all other matters to make settlement effective. Power has been conferred under Section 32G on the Settlement Commission to order provisional attachment to protect revenue. Under Section 32H, power has been conferred on the Settlement Commission to reopen the completed proceedings. Settlement Commission is conferred with all powers vested in Central Excise Officer under the Act or the Rules made thereunder (Section 32I). Section 32J speaks of inspection of reports and for the sake of convenience is extracted hereunder.

"**SECTION 32J. Inspection, etc., of reports.** – No person shall be entitled to inspect, or obtain copies of, any reports made by any Central Excise Officer to the Settlement Commission; but the Settlement Commission may, in its discretion furnish copies thereof to any such person on an application made to it in this behalf and on payment of the prescribed fee:

Provided that, for the purpose of enabling any person whose case is under consideration to rebut any evidence brought on record against him in any such report, the Settlement Commission shall, on an application made in this behalf, and on payment of the prescribed fee by such person, furnish him with a certified copy of any such report or part thereof relevant for the purpose."

Under Section 32K, power has been conferred on the Settlement Commission to grant immunity from prosecution and penalty on being satisfied that applicant has cooperated with the Settlement Commission in the proceedings before it and has made full and true disclosure of his duty liability.

Under Section 32L, power is conferred on the Settlement Commission to send the case back to the Central Excise Officer. To the extent relevant, for the purpose of enquiry on hand, Section 32L is extracted hereunder:

"**SECTION 32L. Power of Settlement Commission to send a case back to the Central Excise Officer.** – (1) The Settlement Commission may, if it is of opinion that any person who made an application for settlement under Section 32E has not co-operated with the Settlement Commission in the proceedings before it, send the case back to the Central Excise Officer having jurisdiction who shall thereupon dispose of the case in accordance with the provisions of this Act as if no application under section 32E had been made."

Section 32M lays down that the order of the Settlement Commission is final and conclusive as to the matters stated therein.

Under Section 32N, any amount specified in an order of settlement passed under sub-section (7) of Section 32F can be recovered and penalty for default in making such payment can be imposed and recovered in accordance with the provisions under Section 11 by the Central Excise Officer. The proceedings before the Settlement Commission shall be deemed to be judicial proceedings within the meaning of Sections 198 and 228 and for the purpose of Section 196 of IPC (Section 32P).

The scheme of the provisions contained in Chapter V discloses that they are intended to afford an opportunity to an assessee to seek pecuniary settlement of any or all the violations of the Act by him and to seek exemption both from penalty under the Act and under the penal law. It is for an assessee to voluntarily make an application to the Settlement Commission and thereby voluntarily submit to its

jurisdiction and to have the matter settled through Settlement Commission. The decision of the Settlement commission is final and conclusive of the matters stated in the order. However, power has been conferred on the Settlement Commission either to proceed with the application or to reject such application including the power to send a case back to the Central Excise Officer.

In **N.Krishnan v. Settlement Commission,** a Division Bench of the Karnataka High Court considered somewhat in *pari materia* provisions contained in Chapter XIXA of the Income Tax Act, 1961, in the context of the scope for interference under Article 226 of the Constitution of India against a decision of the Settlement Commission. It was opined that a decision of the Settlement Commission could be interfered with only when –

> " (i) if grave procedural defects such as violation of the mandatory procedural requirements of the provisions in Chapter XIX-A and/or violation of the rules of natural justice is made out;
>
> ii. if it is found that there is no nexus between the reasons given and the decision taken by the Settlement Commission;
>
> iii. this court cannot interfere either with an error of fact or error of law alleged to have been committed by the Settlement Commission."

We are in respectful agreement with the view of their Lordships of the Karnataka High Court in **N.Krishnan v. Settlement Commission** (supra). Accordingly, in our view, the order impugned would have to be considered in the light of the above stated principles.

For the said purpose, we deem it appropriate to extract the relevant reasons which persuaded the Settlement Commission to reject the application. The relevant portion of the order of the Settlement Commission impugned, in this proceedings, reads as under.

"With reference to the plea that clearances enumerated in Annexure A were all physician's samples of two tablets per strip, the applicant was given an opportunity to prove their claim, but they have not advanced any evidence in this regard. Thus, the admission of miniscule duty amount of Rs.2,05,976/- with reference to clandestine clearances, based on unsubstantiated valuation claims in respect of Annexure A and non admission of duty liability on the excess stock recorded in M/s.Arsa Pharmaceutical stock register lead only to the inevitable conclusion that the applicant company is not making a true and full disclosure of duty. Therefore, we do not consider it necessary to go into other details of the

arguments made by both sides. Even after being given an opportunity to reconcile the defects with Revenue and come out with revised submissions, we find that the applicant has not budged an inch from their earlier stand, although the Revenue has accepted certain duplications and clerical errors in computation of duty liability to the extent of Rs.1,46,325/-. One of the mandatory conditions for admission of the case for settlement is truthful disclosure of the entire duty liability, which is not forthcoming in this case."

It was noticed by the Settlement Commission that Annexure A to the SCN reveals the clearances made by the petitioner to ARSA and recorded in the note book No.67 recovered under panchanama dated 17-7-2001. It was further noticed by the Settlement Commission that applicant – petitioner admits the clearances mentioned in Annexure A with reference to quantities but it is not admitting the value thereof on the plea that all were physician's samples containing two tablets per strip. It was further noticed by the Settlement Commission that although the physician's samples appear to have been indicated as 'PS', in some of the entries contained in the note book, others do not have such indication. The petitioner was given opportunity to satisfy the Settlement Commission of the duty liability with respect to the quantity, clearances mentioned in Annexure A, and admitted by the petitioner. The petitioner did not avail of the opportunity so given to it and, therefore, the Settlement Commission formed the opinion that the mandatory conditions (truthful disclosure of duty liability) for admission of the case have not been made out.

The interim order dated 1-9-2004, filed at page 33 of the material papers to which attention of this Court was drawn by Sri Rajasekhar Reddy, shows that counsel for the petitioner was cautioned by the Settlement Commission to lead *prima facie* evidence even at the admission stage to prove what they plead is correct. The applicant was directed to sit with the Revenue and reconcile the entries and come up with their valid explanation. From the said interim order, it would appear that the counsel for the petitioner was asked to verify and give 'evidence' to indicate that trade samples i.e., other than physician samples were also cleared in strips of two only as in the case of physician samples as claimed by them. To determine the duty liability on the admitted quantity of clandestine clearances it is necessary to determine whether the strips cleared were strips of 10 like in other commercial packing or strips of two. Despite this opportunity, the applicant-petitioner did not make truthful disclosure. Instead, it was found by the Settlement Commission that applicant stuck to its original stand. The stand taken in the application filed by the petitioner is to the following effect.

"As regards the simple note book vide (a) above, the department has taken the quantities of

the medicaments mentioned therein and demanded duty applying the value relating to the sale value of the goods. In this connection it is submitted that this book was entitled "SAMPLE BOOK" and was used for the sole purpose of keeping an account of the samples removed for distribution free-of-cost. The said note book is referred at Sl.No.67 of the Panchnama. This sample book contains date wise dispatches of various P or P medicaments under two separate columns viz., Actual and invoice for the period between 06-01-2000to 01-02-2000. The SCN alleged that totally goods valued at Rs.30,10,835/- involving a duty of Rs.8,15,484/- has been cleared without payment of duty. The applicant admits, in this regard, that they have dispatched the said quantities of samples (S)/Physician samples (PS) between 06-01-2000 to 01-02-2000. However, in the Annexure D enclosed to the notice in respect of few entries the price of samples is adopted, and in respect of others the Normal Sale price is adopted for valuation. The applicant submits that they are samples (marked "S")/Physician samples (marked "PS") supplied free of cost to ARS, without invoice and account which are meant for free distribution, to improvise the market for the products which are only one year old in the market. In his answer to question No.10 of the statement Shri C.N.Ramesh, MD of ARSA categorically mentions this fact. Hence, the applicant has re-valued adopting samples price for all entries and the total value works out to Rs.12,87,349/- involving a duty of Rs.2,05,976/- only."

(emphasis supplied)

What is relevant under Section 32E of the Act is that the applicant should make –

i. a full and true disclosure of his duty liability which has not been disclosed before the Central Excise Officer having jurisdiction;

ii. the manner in which the liability has been derived; and

iii. the additional amount of excise duty accepted to be payable by it;

These are mandatory conditions for entertaining an application for settlement of the case or for granting any relief including immunity from prosecution and penalty.

The onus is on the applicant to make a full and true disclosure of the duty liability and the manner in which the same is arrived at. It is only when the Settlement Commission is satisfied that the applicant has made a full and true disclosure, the application can be admitted and proceeded with. This is for the reason that the object behind the enactment of the provisions relating to settlement is the creation of a forum for self-surrender. The Settlement Commission is constituted as an extraordinary measure for providing an opportunity to such persons to make a true confession and to have matters settled once for all. The

contentions advanced before this Court by the learned counsel for the petitioner proceed on the premise that the obligation to make truthful disclosure of duty liability would arise after the application is admitted and not before and that the Revenue is required to first establish the stand taken in the SCN. In our view, such a premise is erroneous. The Settlement Commission is not a forum for challenging the legality of orders passed under the provisions of the Act. The Settlement Commission in the case on hand having found that the applicant-petitioner did not fully satisfy the mandatory requirements of full and true disclosure of its liability, the said decision cannot be said to have no nexus with the ultimate decision taken by the Commission to reject the application. We accordingly find that no ground has been made out for interference with the order impugned in the instant writ petition inasmuch as the same suffers from no violation of any mandatory procedural requirements nor can it be said that the decision making process suffers from procedural defects.

The Settlement Commission found, and in our view, rightly so that the applicant-petitioner did not fully satisfy the mandatory requirement under law.

We also find no substance in the contention of the petitioner as regards violation of principles of natural justice. It is averred in paragraph 14 that the Settlement Commission relied upon the reports submitted by the Commissioner of Central Excise dated 3-6-2004 and 20-9-2004. If the petitioner wanted the reports, it was required to make an application under Section 32J. It does not appear that any such application was made under Section 32J by the petitioner and it was refused copies of the said reports. Reliance of the petitioner on the judgment of the Supreme Court in **M/s.R.B.S.D.Pd & F.N. Das v. Settlement Commission** is misplaced. In that case, the Commissioner had tendered his objections and the Settlement Commission rejected the application for settlement without hearing the applicant. The applicant applied to the Commission to recall its order since it had been passed without given him an opportunity of hearing. During the pendency of that application, Finance Act, 1979 came into force and sub-section (1)A to Section 245D was inserted which empowered the Settlement Commission to overrule the objections of the Commissioner. The applicant, thereupon, applied to the Settlement Commission to permit him to contest the objections of the Commissioner under the proviso newly inserted. The Settlement Commission rejected the application *inter alia* on the ground that the application would have to be disposed of in accordance with law which prevailed on the date of the order made by the Settlement Commission.

In the case on hand, admittedly, the petitioner was afforded an opportunity of hearing before the impugned order came to be passed. The alleged violation of principles of natural justice is founded on non-furnishing of the reports of the Commissioner, which the petitioner could have applied for their certified copies in terms of Section 32J and chose not to apply for the same, can have no grievance. We, therefore, find no substance in the said objection.

In the result, the writ petition is liable to be and is accordingly dismissed at admission stage.

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(M.H.S.ANSARI, J.)

14th March 2005.

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(T.Ch.SURYA RAO, J.)

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To

1.The Customs & Central Excise Settlement Commission,

Additional Bench, Narmada Block, Custom House, 33, Rajaji Salai, Chennai-600 001.
2.The Commissioner of Central Excise, Hyderabad-IV Commissionerate, Possenet Bhavan, Ramkoti,Hyderabad.

3. Two CD copies.